142

(1)

Supreme Court, U.S.
FILED
09-465 OCT 16 2009
OFFICE OF THE CLERK

No.

In the
SUPREME COURT OF THE UNITED STATES

Jonathan Bowers, *Petitioner*

v.

City of Eugene, et al., *Respondent*

On Petition For Writ Of Certiorari
To The Court of Appeals of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

Jonathan Bowers *pro se*
1149 Ferry Street, #105
Eugene, Oregon 97401
Tel. (541) 485-1732

QUESTIONS PRESENTED

1. Does the Final Opinion and Order of the Land Use Board of Appeals of the State of Oregon restrict the variety of related public input the City of Eugene is obligated to review regarding public land use vacations done in the public interest, as per Eugene Code 9.8725?

2. If such restriction exists, does the order violate the First Amendment of the United States Constitution?

3. If indeed the Land Use Board of Appeals' order is found to be unconstitutional, how does the agency then resolve whether the disputed land use vacations were done in the public interest, as per EC 9.8725?

PARTIES TO THE PROCEEDING

Petitioner:

JONATHAN BOWERS

Representing himself *pro se*, 1149 Ferry Street, #105, Eugene, Oregon, 97401

Petitioner-Intervenor below:

DEBORAH FRISCH

Represented herself *pro se*, 3003 W. 11th Avenue, PMB 168, Eugene, Oregon 97402

Respondents:

CITY OF EUGENE

Represented by Emily N. Jerome, 777 Pearl Street, Room 105, Eugene, Oregon 97401

and

OREGON STATE BOARD OF HIGHER EDUCATION

Represented by Patrick M. Ebbett, OREGON DEPARTMENT OF JUSTICE, 1162 Court Street NE, Salem, Oregon, 97301

TABLE OF CONTENTS

Page

Questions Presented..... i

Parties to the Proceeding..... ii

Table of Authorities..... iv

Opinions Below..... 1

Statement of Jurisdiction..... 1

Constitutional and Statutory Provisions Involved..... 1

Statement of the Case..... 3

Reasons for Granting the Writ..... 5

Conclusion..... 11

Appendix:

Judgment of the Court of Appeals of the State of Oregon, dated August 10, 2009..... App. 1

Opinion of the Court of Appeals of the State of Oregon, dated April 1, 2009..... App. 3

Order Denying Review from the Supreme Court of the State of Oregon, dated July 9, 2009..... App. 4

Final Opinion and Order of the State of Oregon Land Use Board of Appeals, dated December 19, 2008..... App. 5

TABLE OF AUTHORITIES

Page

CASES

Abrams v. United States, 250 U.S. 616 (1919)..... 5

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987)..... 10

Carey v. Brown, 447 U.S. 455 (1980)..... 11

Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557 (1980)..... 10

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1982)..... 11

Cohen v. California, 403 U.S. 15 (1971)..... 5

Dennis v. United States, 341 U.S. 494 (1951)..... 5

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)..... 11

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)..... 11

Metromedia v. City of San Diego, 453 U.S. 490 (1981)..... 11

Police Dep't v. Mosley, 408 U.S. 92 (1972)..... 11

Regan v. Time Inc., 468 U.S. 641 (1984)..... 11

Schneider v. Smith, 390 U.S. 17 (1968)..... 10

Shelton v. Tucker, 364 U.S. 479 (1960)..... 10

Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105 (1991)..... 10

Texas v. Johnson, 419 U.S. 397 (1989)..... 10

United States v. Robel, 389 U.S. 258 (1967)..... 10

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)..... 10

Widmar v. Vincent, 454 U.S. 263 (1981)..... 11

CONSTITUTIONAL PROVISIONS

Article 1, § 8 of the Oregon Constitution..... 2

First Amendment of the Constitution of the United States..... 2

MISCELLANEOUS

Eugene Code 9.8725..... 3-9, 11

Eugene Gressman, et al., Supreme Court Practice 9th Edition. Arlington, VA: BNA Books, 2007..... 2

Oregon Revised Statute 197.835(9)(a)(C)..... 3-4

Oregon Revised Statute 197.850 (9)(b)..... 4

OPINIONS BELOW

The Land Use Board of Appeals of the State of Oregon issued its Final Opinion and Order as *Bowers v. City of Eugene* (LUBA Nos. 2008-156 and 2008-157) on December 19, 2008. The Land Use Board of Appeals' order is reproduced in the appendix to this petition (App. 3-22). On April 1, 2009, the Court of Appeals of the State of Oregon affirmed the Land Use Board of Appeals' order without a published opinion (App. 23). On July 9, 2009, the Supreme Court of the State of Oregon denied further review of the Land Use Board of Appeals' order without a published opinion (App. 24). On August 10, 2009, the Court of Appeals of the State of Oregon issued its appellate judgment (App. 1).

STATEMENT OF JURISDICTION

The Supreme Court of the State of Oregon denied review on July 9, 2009. On August 10, 2009, the Court of Appeals of the State of Oregon issued its appellate judgment. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a). The petitioner has notified the following of this petition: Deborah Frisch, 3003 W. 11th Ave., PMB 168, Eugene, Oregon, 97402; Emily N. Jerome, attorney for the City of Eugene, 777 Pearl Street, Room 105, Eugene, Oregon 97401; and the Attorney General of the State of Oregon of this petition by serving it upon the Attorney General's Office, 1162 Court Street NE, Salem, OR 97301.

CONSTITUTIONAL PROVISION INVOLVED

The immediate constitutional provision involved, which petitioner raised in his appeals to the Court of Appeals and Supreme Court of the State of Oregon, includes Article One, section eight to the Oregon Constitution, which provides as follows:

Article 1, §8. Freedom of speech and press:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

It should be noted that petitioner recognizes that "it is essential to the jurisdiction of the Supreme Court under §1257(a) that a substantial federal question has been properly raised in the state court proceedings."[1] While the constitutional provision noted above is based upon a state constitution,

> [s]ometimes the state law matter may be so interrelated with, or influence by, federal law principles as to bring a federal dimension to the state court's ruling on the state law issue.[2]

Thus, given that abridgement of speech principles had been established in petitioner's appeal to both the Court of Appeals of the State of Oregon

---

[1] EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 180-181 (9th ed. 2007).

[2] *Id.* at 212.

and the Supreme Court of the State of Oregon, the primary constitutional provision involved that follows in this petition is the First Amendment of the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or the abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner claims in the initial appeal to the Land Use Board of Appeals of the State of Oregon (LUBA) that the City of Eugene's decision to vacate public lands, as per Eugene Code 9.8725[3], was not done in the public interest: the decision was not supported by substantial evidence in the whole record.[4]

---

[3] Eugene Code 9.8725 Approval Criteria for the Vacation of Improved Public Right-of-Way, Public Ways Acquired with Public Funds, and Undeveloped Subdivision and Partition Plats:

> The city council shall approve, or approve with conditions and reservations of easements, the

[4] Oregon Revised Statues (ORS) 197.835 Scope of review, rules:
(9) In addition to the review under subsections (1) to (8) of this section, the board shall reverse or remand the land use decision under review if the board finds:

In its resulting order, LUBA held that

> EC 9.8725 does not require that the city establish that all secondary effects that may flow from the development made possible by the vacation request (here the likelihood that McArthur Court will be demolished and presumably the certainty that it will no longer be the university's basketball arena) are also in the public interest. Neither does EC 9.8725 require that the university 'conclusively demonstrate' as part of its application to the city that the new basketball arena is necessary because there is 'unequivocal fact and support' for the proposition that renovation of McArthur Court is not a viable and preferable alternative. App. 15-16.

Petitioner filed an appeal of LUBA's order to the Court of Appeals of the State of Oregon, as well as the Supreme Court of the State of Oregon, claiming that the order – not the City's decision and findings – is unconstitutional[5]. The government

---

(a) The local government or special district:
(C) Made a decision not supported by substantial evidence in the whole record.

[5] ORS 197.850 Judicial review of board order; procedures, scope of review; attorney fees; undertaking:
(9) The court may affirm, reverse or remand the order. The court shall reverse or remand the order only if it finds:
(b) The order to be unconstitutional.

agency, instead of being a neutral bystander that does not interfere with the marketplace of ideas[6], interpreted EC 9.8725 in such a way that would limit public discourse regarding public land use vacations done in the public interest. Such a limitation of individuals' speech by a government agency deserves the highest level of scrutiny, with a strong presumption of invalidity.

On April 1, 2009, the Court of Appeals of the State of Oregon affirmed LUBA's order without opinion. Seeking further review of LUBA's order, petitioner filed an appeal of LUBA's order to the Supreme Court of the State of Oregon. Petitioner asked the court to accept review of LUBA's order. The Supreme Court of the State of Oregon considered the petition for review but ordered that it be denied on July 9, 2009. On August 10, 2009, the Court of Appeals of the State of Oregon issued its appellate judgment in the case. This petition follows.

REASONS FOR GRANTING THE WRIT

The judgment the Court of Appeals of the State of Oregon, with regard to the Final Opinion and Order of the Land Use Board of Appeals of the State of Oregon, should be reviewed by this Court for the reasons set out below.

A governmental body must, at the very least, take into consideration such speech as relates to public lands being vacationed in the public interest,

---

[6] *Abrams v. United States*, 250 U.S. 616, 639 (1919) (Holmes, J., dissenting); *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting); *Cohen v. California*, 403 U.S. 15, 24-25 (1971).

as per EC 9.8725. To do otherwise, that is, to restrict the marketplace of ideas regarding whether a land use vacation is done in the public interest, not only stifles the public's say in how their government is operated in their name, but makes moot any input the public may offer to the City to consider when such a governmental body acts in their name, particularly when the decision is based solely on a public interest criteria, as per EC 9.8725. LUBA's order affirms such restrictions, however, condoning the City's findings and interpreting EC 9.8725 in such a way that the City does not 1.) need to "establish that all secondary effects that may flow from the development made possible by the vacation request" are in the public interest and 2.) require that the university administration and associated officials carry a heightened evidentiary burden of demonstrating that the public interest is better served by replacing the University of Oregon's current basketball arena, McArthur Court, with a new basketball one, even if it has not been conclusively shown that McArthur Court is in need of replacement.

(McArthur Court's replacement would be assured by the land vacations. In other words, the structure's preservation, *in this instance of acquiring the land*, would be fulfilled by not allowing the land vacations to consummate.)

Not taking into consideration all secondary effects that may stem from a public land use vacation restricts the voice of the public who will have to live with the consequences of a land use vacation if granted, particularly when such consequences are well addressed within the public hearing process and bear potentially significant weight within the

community.

While, as LUBA suggests, "EC 9.8725 does not require that the city establish that all secondary effects that may flow from the development made possible by the vacation request ... are also in the public interest," the code is generally worded. Such generality precludes that the agency could require the city to consider all related secondary effects resulting in a land use vacation. Yet, LUBA interpreted otherwise, with both the Court of Appeals and Supreme Court of the State of Oregon affirming LUBA's stance.

Nullifying such a restricted interpretation of EC 9.8725 that LUBA, the Court of Appeals and Supreme Court of the State of Oregon supports would qualify the code to be interpreted more broadly – a resulting interpretation that would have LUBA order the City to 1.) consider and establish that "all secondary effects that may flow from the development made possible by the vacation request ... are also in the public interest," and 2.) require that the university administration and associated officials (public stewards of McArthur Court, not owners) carry a heightened evidentiary burden of demonstrating that the public interest is better served by replacing McArthur Court with a new basketball arena. Given the fact that university administration and officials are public employees of the State, such justification on their part of showing to the public they serve that McArthur Court is in need of replacement would be required, especially so considering 1.) factual documentation demonstrating the endearing cultural and historical value the structure holds to the community of the university, the city, and the state as well as the origins of college

basketball as a whole, and 2.) existing evidence demonstrating such replacement is wholly unnecessary, a fact given more weight due to the university administration and associated official's failure to provide evidence showing otherwise when the opportunity had arisen for them to do so.

Secondary effects could be defined as the consequences that will result from public land being vacationed. Some are minor, some are major. In the present case, such secondary effects include, for example, a project's potential economic viability, a new University of Oregon basketball arena, and the discontinued use of McArthur Court as the University of Oregon's basketball arena.

LUBA's order directs the City, as per EC 9.8725, to disregard said consequences – not only in this instance of land vacations but in future vacations as well.

In the current instance, the City, by even mentioning considered future uses (that is, secondary effects such as potential economic viability and a new basketball arena) in its findings, even if just touched upon, leaves open the door to the City having to, at a bare minimum, review, consider, and reconcile most, if not all, secondary effects brought forth before it, hence, petitioner's original appeal to LUBA that the City's decision wasn't based on substantial evidence in the whole record. Otherwise, the public interest standard – taking the form of testimony at public hearings and written submissions – is not only abrogated and nullified, but no value is placed on such input.

The City's findings, outside of its slight mention of the new basketball arena and the future economic potential resulting from the land use

vacations – both of which are secondary effects - utterly failed to address how, if any, public input mattered, especially when the City knew full well the primary consequence that would result from vacationing the land: allowing the University of Oregon to replace McArthur Court with a new basketball arena.

In fact, the City's findings suggest that the land would be in the public interest *under any circumstances*, regardless of any public input or any kind of consequence related to the public land vacation, as per EC 9.8725. Such a blatant disregard of public input and any ensuing consequences that may result from a public land vacation is antithetical to a public interest criterion and a restriction of the marketplace of ideas. Land use vacations, as per EC 9.8725, must evaluate public input and related consequences of the vacation on a case-by-case basis. To view the vacations otherwise leaves no room for the public to have reason to voice concerns about the impact a particular vacation may have on themselves and their community.

All the secondary effects that would result from these vacations (that is, potential economic viability, a new basketball arena, discontinued use of McArthur Court, etc.), brought up in the public hearing and with written submissions, must be considered, weighed and justified. To do otherwise would make a farce of the public interest criterion in EC 9.8725.

To dismiss public input, which may take the form of secondary effects, is exactly what LUBA's order is directing the City to do in land use vacations, as per EC 9.8725. The Court of Appeals and Supreme Court of the State of Oregon affirmed

such a stance.

As mentioned earlier in the petition, a government agency should act as a neutral bystander and not actively interfere with the marketplace of ideas. Such neutrality precludes that any regulation of speech be content-neutral. If regulation is in order, however, it must receive the highest level of judicial scrutiny, with a strong presumption of invalidity.

A regulation must be content-neutral, based on factors not related to the message that will be hampered by the regulation, as stressed by Justice William Brennan in 1989.[7] In this case, the message takes the form of secondary effects noted by individuals that may result in a land use vacation. The government "must show that its regulation is necessary to serve a compelling [governmental] interest and is narrowly drawn to achieve that end."[8]

This Court has shown through the years that when the government seeks to carry out a goal, and it has a variety of available effective means to that given end, it must choose a measure that interferes the least with rights of expression.[9]

As a general matter, the government may not regulate speech "because of its message, its ideas, its

---

[7] *Texas v. Johnson*, 419 U.S. 397, 404-06 (1989).

[8] *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

[9] *Shelton v. Tucker*, 364 U.S. 479 (1960); *United States v. Robel*, 389 U.S. 258 (1967); *Schneider v. Smith*, 390 U.S. 17 (1968); *Virginia State Bd of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 564, 565, 569-571 (1980).

subject matter, or its content."[10] Moreover, this Court has emphasized numerous times the role of the freedom of speech garnered from the First Amendment of the Constitution of the United States in facilitating, and making possible, political dialog and the operation of democratic institutions.[11]

Petitioner believes that LUBA's order, which gives the City authority to dismiss certain aspects of public input (that is, secondary effects) regarding public lands being vacationed, is unconstitutionally restrictive, especially so given that secondary effects, in various applications, could be found to be in the public interest. Petitioner also argues in this petition that the Court of Appeals of the State of Oregon missed a valuable opportunity to uphold the free speech rights of individuals in this matter of land use vacations done in the public interest, as per 9.8725.

CONCLUSION

For such reasons stated above, petitioner requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

---

[10] *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). See also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-12 (1975); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Carey v. Brown*, 447 U.S. 455 (1980); *Metromedia v. City of San Diego*, 453 U.S. 490 (1981)(plurality opinion); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Regan v. Time Inc.*, 468 U.S. 641 (1984).

[11] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77, 781-83 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1982).

JONATHAN BOWERS *pro se*
1149 Ferry Street, #105
Eugene, Oregon 97401
Tel. (541) 485-1732

Dated October 13, 2009

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JONATHAN BOWERS,
Petitioner,
and
DEBORAH FRISCH,
Intervenor-Petitioner below,
v.
CITY OF EUGENE and OREGON STATE BOARD OF HIGHER EDUCATION,
Respondents.

Land Use Board of Appeals
2008156, 2008157

A141020

APPELLATE JUDGMENT

Submitted on March 06, 2009.
Before Haselton, Presiding Judge, and Armstrong, Judge, and Rosenblum, Judge.
Attorney for Petitioner: Jonathan Bowers pro se.
Attorney for Respondent City of Eugene: Emily N. Jerome.
Attorney for Respondent Oregon State Board of Higher Education: Patrick M. Ebbett.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

[X] Costs allowed, payable by Petitioner

MONEY AWARD

Judgment #1

Creditor(s): City of Eugene and Oregon State Board of Higher Education
Attorney: Emily N. Jerome and Patrick M. Ebbett

Debtor(s): Jonathan Bowers
Attorney: *pro se*

Costs: $100
Total Amount: $100
Interest: Simple, 9% per annum, from the date of this appellate judgment.

MONEY AWARD

Judgment #2

Creditor(s): Oregon State Board of Higher Education
Attorney: Patrick M. Ebbett

Debtor(s): Jonathan Bowers
Attorney: *pro se*

Costs: $203.23
Total Amount: $203.23
Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment
Effective Date: August 10, 2009.

Court of Appeals
(seal)

FILED: April 1, 2009

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JONATHAN BOWERS,
Petitioner,
and
DEBORAH FRISCH,
Intervenor-Petitioner below,
v.
CITY OF EUGENE and OREGON STATE BOARD OF HIGHER EDUCATION,
Respondents.

Land Use Board of Appeals
2008156, 2008157

A141020

Submitted on March 06, 2009.
Before Haselton, Presiding Judge, and Armstrong, Judge, and Rosenblum, Judge.
Attorney for Petitioner: Jonathan Bowers *pro se*.
Attorney for Respondent City of Eugene: Emily N. Jerome.
Attorney for Respondent Oregon State Board of Higher Education: Patrick M. Ebbett.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents
[ ] No costs allowed.
[X] Costs allowed, payable by Petitioner

IN THE SUPREME COURT OF THE STATE OF OREGON

JONATHAN BOWERS,
Petitioner,
and
DEBORAH FRISCH,
Intervenor-Petitioner below,
v.
CITY OF EUGENE and OREGON STATE BOARD OF HIGHER EDUCATION,
Respondents.

Court of Appeals
A141020

S057326

ORDER DENYING REVIEW

Upon consideration by the court.
The court has considered the petition for review and orders that it be denied.

July 9, 2009 — DATE

/s Paul J. De Muniz — CHIEF JUSTICE

** Kistler, J., not participating
c: Emily N Jerome
Patrick M Ebbett
√ Jonathan Bowers
Vb/S057326odpr090709

ORDER DENYING REVIEW

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section, Supreme Court Building, 1163 State St., Salem, OR 97301-2563

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEC19'08 PM 1:51 LUBA

JONATHAN BOWERS,
Petitioner,

and

DEBORAH FRISCH,
Intervenor-Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

OREGON STATE BOARD OF HIGHER EDUCATION,
Intervenor-Respondent.

LUBA Nos. 2008-156 and 2008-157

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Jonathan Bowers, Eugene, filed a petition for review and argued on his own behalf.

Deborah Frisch, Eugene, filed a petition for review and argued on her own behalf.

Emily N. Jerome, Eugene, filed a response brief and argued on behalf of respondent. With her on the brief were Harrang Long Gary Rudnick PC, Steven E. Shipsey, Assistant Attorney General, and Erin L. Donald Assistant Attorney General.

Steven E. Shipsey, Assistant Attorney General and Erin L. Donald Assistant Attorney General, Salem, filed a response brief and Steven E. Shipsey argued on behalf of intervenor-respondent. With them on the brief were Emily N. Jerome and Harrang Long Gary Rudnick PC.

HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

RYAN, Board Member, did not participate in the decision.

AFFIRMED 12/19/2008

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals two city decisions that vacate portions of an alley and city street right-of-way.

MOTION TO INTERVENE

Deborah Frisch moves to intervene on the side of petitioner in this appeal. There is no opposition to the motion, and it is granted.

The Oregon State Board of Higher Education, the applicant below, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is granted.

FACTS

The Oregon State Board of Higher Education (OSBHE) owns property (the subject property) immediately south of Franklin Boulevard at its intersection with East 13th Avenue. The subject property lies at the northeast corner of the University of Oregon campus, immediately west of Villard Street, a north-south street that runs along the east side of the campus. The university wishes to construct a new basketball arena on the subject property. McArthur Court is the university's current basketball arena. McArthur Court is located some distance to the southwest of the subject property, near the center of the university campus. If the new basketball arena is constructed, the ultimate use of McArthur Court is uncertain at this point. However,

if the new basketball arena is constructed, McArthur Court would no longer serve as the university's basketball facility and one possibility is that McArthur Court would be demolished in the future and replaced with a new campus building.

The subject property is divided by Villard Alley. Villard Alley is a north-south alley that divides the easternmost one-quarter of the subject property from the westernmost three-quarters of the property. OSBHE requested that the city vacate Villard Alley, between East 13th Avenue on the north and East 15th Avenue on the south. In addition, OSBHE requested that the city vacate a small portion of East 13th Avenue, where it intersects with Franklin Boulevard. A portion of the exterior sidewalk area around the proposed basketball arena would occupy the vacated portion of East 13th Avenue. The easternmost portion of the new arena would occupy a portion of the vacated Villard Alley. Record 11, 19, 679. The city council found that the requested vacations would be in the public interest and granted the requests. This appeal followed.

PETITIONER'S ASSIGNMENT OF ERROR

The sole approval criterion that controls vacations like the two vacations that are at issue in this appeal is set out at EC 9.8725. EC 9.8725 requires that the city find that the disputed vacations are "in the public interest." In a single assignment of error, petitioner argues that the disputed vacations are not in the public interest.

McArthur Court, built in 1926, was designed by Ellis Lawrence. Ellis Lawrence was a prominent Oregon architect and longtime dean of the University

of Oregon School of Architecture until his death in 1946. In the first part of his petition for review, relying in part on internet links that lead to information that is not included in the record of this appeal, petitioner explains that McArthur Court is a historic structure and one of a handful of historic University Division 1 basketball arenas in the United States that remain in use today. Petitioner contends that McArthur Court could be renovated and continue to serve satisfactorily in the future as the University of Oregon's basketball arena. Petitioner faults the city for relying on the personal opinions of various persons and representatives of the university and studies that in turn rely in large part on those personal opinions to conclude that McArthur Court has come to the end of its useful life, is unsafe, and because it lacks the amenities of modern basketball arenas should be replaced by the proposed new arena on the subject property. Petitioner contends that the disputed right-of-way vacations, which would allow the university to go forward with the new basketball arena and discontinue use of McArthur Court as the university's basketball arena is therefore not "in the public interest," as required by EC 9.8725.

A. The City's Decision

Eugene Code (EC) 9.8700 through 9.8725 set out procedures and standards for vacating public ways. EC 9.8725 provides:

> "**Approval Criteria for the Vacation of Improved Public Right-of-Way, Public Ways Acquired with Public Funds, and Undeveloped Subdivision and**

> **Partition Plats**. The city council shall approve, or approve with conditions and reservations of easements, the vacation of improved public right-of-way, public ways acquired with public funds, or undeveloped subdivision and partition plats, or portions thereof, including public right-of-way and improved public easements located therein, only *if the council finds that approval of the vacation is in the public interest.*" (Emphasis added.)

The city findings that explain why the city found that the requested vacation of Villard Alley is in the public interest include the following:

> "The benefit of the alley to the transportation system is, and has been very limited. The portion of Villard Alley * * * proposed for vacation has been gated for years (on the south side of the former Williams Bakery site) because of safety conflicts between trucks and pedestrians. The alley's current circumstances also provide minimal benefit to the public. The University now owns all of the land adjacent to Villard Alley. Therefore, there are no other properties which directly depend on this portion of Villard Alley for access. The alley also provides little benefit to pedestrians and bicyclists traveling between Franklin Boulevard and destinations to the south. For example, access to the EmX line would be east or west of the alley to reach the stations. There are no destinations other than University lands themselves that are better served by this alley. As such, there is no additional out-of-direction

travel for pedestrians and bicyclists necessitated by the proposed vacation.

" * * * [C]onsolidation of the parcels will improve traffic circulation in the area by reducing the number of driveways on Villard Street. With a single owner, future redevelopment of the site will be able to coordinate and consolidate driveway locations and address overall circulation to a much greater degree than under separate ownership.

"* * * * *

"The current alignment of the alley significantly limits how the eastern portion of the site can be developed. Elimination of Villard Alley would provide much more flexibility to develop the site in a coordinated and integrated manner. By enabling consolidation of this site, future redevelopment plans can address the variety of development concerns (both potential impacts and benefits) in a holistic manner. Given the limited value of Villard Alley, its benefit to the public would be minimal in comparison to the benefits resulting from a comprehensive development plan for the entire site." Record 13-14.

The city also found that granting the requested vacation of a portion of the East 13th Avenue right-of-way near Franklin Boulevard is in the public interest. The city will retain a public utility and pedestrian access easement across the vacated portion of East 13th Avenue and the city found that

the requested vacation will not interfere with the operation of East 13th Avenue. As was the case with the findings regarding Villard Alley, the findings concerning the East 13th Avenue vacation find that the vacation will make it much easier to plan the subject property for redevelopment in a comprehensive manner. The findings regarding the requested East 13th Avenue vacation include the following paragraph that appears immediately before the city's ultimate conclusion that vacating the requested portion of the East 13th Avenue right-of-way will be in the public interest:

> "The ability to re-use this property in a consolidated manner also enhances its economic viability given the additional flexibility afforded [by] the vacation of the street. As such the vacation can help facilitate increased economic opportunities associated with its redevelopment. Any development of this consolidated, commercially zoned parcel, *even in the absence of a basketball arena* would result in substantial employment opportunities both for the construction trade as well as increased employment opportunities with the University. These additional employment and economic opportunities will result in substantial benefit to the community." Record 21 (emphasis added).

A paragraph nearly identical to the one quoted above appears immediately before the city's conclusion that granting the requested vacation of Villard Alley is in the public interest. Record 14.

Petitioner does not really challenge the above

findings. Before returning to petitioner's argument, it is worth emphasizing that the city's findings conclude that the disputed vacations are in the public interest, without regard to whether the disputed vacations actually result in the construction of the anticipated new basketball arena. The city's reasoning, which is not really challenged by petitioners, is that neither Villard Alley nor the vacated portion of the East 13th Avenue right-of-way serve important or necessary public purposes in their current condition, and vacating those rights of way would make it easier to redevelop the currently vacant subject property and make it more likely that such development will occur and generate employment and other economic benefits.

B. Petitioner's Legal Theory

Petitioner argues that the city's findings, portions of which were quoted earlier, might be adequate to establish that the proposed vacations will be in the public interest if the city had first *conclusively* demonstrated that McArthur Court needs to be replaced.

> "I should note that the Findings * * * would only be applicable had the [university] conclusively demonstrated that a new arena is necessary. A couple of conclusions should be noted. First, had the University of Oregon lacked a basketball facility to begin with, I would not have any qualms about the property vacations. Second, had the [university] demonstrated to the public and various public bodies conclusive information that McArthur

> Court is in need of replacement, I would not have any qualms with the [city] vacating the properties the [university] seeks." Petition for Review 8.

Later in the petition for review, petitioner includes the following argument:

> "Before I begin, however, I want to point out to [LUBA] that an endeavor to build a basketball arena, or any other major project for that matter, on the campus of the University of Oregon, would require the utmost attention to detail and a high level of suitable and substantial fact on the part of the [university] that would convincingly show – to [LUBA], governmental bodies, and especially the public that such projects are necessary. As such, it would be absolutely prudent that at *all* levels of the proposed arena's development – from getting permission to obtain funds, to spend funds, and to build – unequivocal fact and support would be necessary. In the current circumstances, such facts and support the [university] *must* show would be that McArthur Court is in need of replacement. * * * Petition for Review 18 (emphases in original).

Petitioner concedes above that if the university did not already have a basketball arena, a decision to approve the disputed vacations to allow the university to construct the disputed basketball arena would be in the public interest. Even without the concession, the city clearly could find that vacating a largely unused right-of-way that crosses vacant

property to allow construction of a new basketball facility is in the public interest. Once that is established, the question becomes what obligation the city has under EC 9.8725, if any, to consider the potential secondary effects of approving the requested vacations and allowing the proposed new basketball arena to be built. Petitioner presents what is obviously a heartfelt case on behalf of renovating McArthur Court instead of building a new basketball arena. We are unprepared to say that the city could not interpret the EC 9.8725 "public interest" criterion to allow it to consider such a secondary effect of vacating rights of way to facilitate redevelopment of vacant land. But the decision that is before us in this appeal does not mention McArthur Court, barely mentions the new basketball arena and clearly does not interpret the EC 9.8725 public interest criterion to require that the city consider the secondary effects of approving the disputed vacations to make it easier to plan for redevelopment of the subject property.

The city decision that is before us finds that without regard to whether the anticipated basketball arena is constructed, the disputed vacations result in practically no loss of useable transportation facilities and result in greater development flexibility on the subject property. The city concludes that those results are sufficient to support its conclusion that the vacations are in the public interest. EC 9.8725 does not require that the city establish that all secondary effects that may flow from the development made possible by the vacation request (here the likelihood that McArthur Court will be demolished and presumably the certainty that it will

no longer be the university's basketball arena) are also in the public interest. Neither does EC 9.8725 require that the university "conclusively demonstrate" as part of its application to the city that the new basketball arena is necessary because there is "unequivocal fact and support" for the proposition that renovation of McArthur Court is not a viable and preferable alternative. Nowhere in the language of EC 9.8725 is there any support for imposing such a heightened evidentiary burden on the university in this case. Because petitioner's first assignment of error is founded on his assumptions that under EC 9.8725 the city must (1) consider such secondary effects and (2) require that the university carry such a heightened evidentiary burden before the city can approve the requested vacations, petitioner's assignment of error provides no basis for remand.

Petitioner's assignment of error is denied.

INTERVENOR-PETITIONER'S FIRST ASSIGNMENT OF ERROR

In her first assignment of error, intervenor-petitioner challenges the adequacy of the city's findings that granting the two vacation requests is in the public interest. She also challenges the evidentiary support for those findings.

A. Findings Challenge

In the first three paragraphs of argument under her first assignment of error, intervenor-petitioner disagrees with the city's findings that vacating

Villard Alley to allow the subject property to be redeveloped as a whole rather than requiring the eastern one- quarter and western three-quarters to be redeveloped separately "enhances its economic viability given the additional flexibility afforded wit[h] the vacation of the street." Intervenor-Petitioner's Amended Petition for Review 2. Intervenor-petitioner contends that "[t]his statement is blatantly false." *Id.*

Intervenor-petitioner must do more than assert that the challenged finding is false. That intervenor-petitioner disagrees with the city's findings does not establish that those findings are inadequate. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993). We do not see how vacating the portion of Villard Alley that separates the eastern one-quarter of the subject property from the western three-quarters of the subject property could possibly "DECREASE [development] flexibility," as intervenor-petitioner argues.

B. Evidentiary Challenge

Under EC 9.8710(5)(a), the city manager is required to estimate the special benefit that will accrue to the party requesting vacation of a public way, and the applicant must submit a deposit with the application that is equal to that special benefit.[1] Intervenor- petitioner argues that the April 14, 2008 Basis of Value Report that the city relied on to determine the special benefit and deposit required by EC 9.8710(5)(a) is inadequate and thus provides an inadequate basis for assuring the city will be adequately compensated for the loss of right-of-way.

We understand intervenor-petitioner to argue that the result of this evidentiary inadequacy is that the city's findings that it is in the public interest to grant the right-of-way vacation requests are not supported by substantial evidence. We turn to intervernor-petitioner's arguments. [1]

---

[1] As relevant, EC 9.8710 provides:

"9.8710 Vacations, Application Requirements.

"* * * * *

"(5) In addition to payment of the application and publication fees * * *, a vacation of improved or unimproved public right-of-way, * * *shall require the payment by the applicant of a deposit equal to the assessment of special benefit that results from the vacation and disposition of property to the benefitted property owners.

"(a) The assessed value of special benefit and the amount of money to be deposited shall be determined by the city manager. The assessed value of special benefit shall include:

1. The value of the real property; and
2. The costs incurred by the city in the construction of public improvements.

"(b) Notice of the proposed assessment for benefits shall be given by mail to the owners of the property to be assessed no less than 20 days prior to the public hearing * * *.

"(c) At least 5 working days prior to the public hearing * * *, the land owner shall deposit with the city the sum of money called for by this subsection (5).

"(d) If the vacation application is approved, the deposit shall beretained by the city.

1. Miscalculation of Square Footage

Intervenor-petitioner argues the applicant miscalculated the square footage of vacated right-of-way and was later required to add $19,153 to the original $463,821 that the university deposited with the city based on the original April 14, 2008 report.

As respondents explain, the $463,821 figure in the April 14, 2008 Basis of Value Report was based on the original site plan and the square footage of the proposed vacation was later increased when that site plan was revised. Record 46. The city required and the university later deposited an additional $19,153 to compensate for the additional vacated right-of-way. Record 198.

We fail to see how the correction in the required deposit demonstrates any inadequacy in the Basis of Value Report.

2. The Basis of Value Report is not an Appraisal and was not Prepared by an Appraiser

Intervenor-petitioner next argues the person who prepared the Basis of Value Report is not licensed to perform commercial or public real estate appraisals and that the Basis of Value report is clearly not an appraisal.

Respondents answer that EC 9.8710(5) does not require an appraisal or require that the city manager's estimate of special benefit be based on an

---

If the vacation application is denied, the deposit shall be returned to the land owner."

appraisal. The Basis of Value Report identifies seven nearby comparable sales during 2007 for which a price per square foot is calculated. Those sales ranged from a high of $39.82 per square foot to a low of $17.63 per square foot. Record 42. The Basis of Value Report then explains how it arrived at its estimate that commercially zoned properties along Franklin Avenue sell for approximately $37 per square foot while properties up to two blocks away from Franklin Avenue sell for approximately $27 per square foot. Record 44. Finally, the Basis of Value Report explains that 12,196 square feet of vacated right-of-way along Franklin Avenue, where the city will retain a public pedestrian and sidewalk easement, was devalued by 65 percent to reflect the retained public easement. In the southern Villard Alley area the city will retain a utility easement and the value was reduced by 50 percent to reflect that easement. No city easements will be retained in the northern Villard Alley area, and its value was not reduced. Based on the above explanation, the April 14, 2008 Basis of Value Report arrives at an estimate of $463,821 for the fair market value of the vacated right-of- way.

Other than arguing that the Basis of Value Report is not an appraisal and that the person who prepared the report is not licensed to prepare commercial real estate appraisals, intervenor-petitioner makes no attempt to challenge the reasoning and rationale for the Basis of Value Report's estimate of fair market value. As respondents correctly point out, EC 9.8710(5) does not require that the city manager's finding of special value be based on an appraisal. Intervenor-

petitioner makes no attempt to explain why she believes the methodology employed in the Basis of Value Report is arbitrary or does not provide an adequate basis for making the required finding of special benefit.

3. Arbitrary Division of the Vacated Rights of Way Into Discounted Subsets

Intervenor-petitioner's final argument under her first assignment of error is that the Basis of Value Report "arbitrarily discounted at 35%, 50% and 100% of the appraised value." Intervenor-Petitioner's Amended Petition for Review 3.

As we have already explained, the Basis of Value Report discounted vacated areas where the city retained public easements. There is nothing arbitrary about discounting the value of acquired property where the property owner retains an easement to allow that property owner to continue using the property for the purposes specified in the easement after the fee ownership is transferred. Intervenor-petitioner makes no attempt to explain why she believes those discounts do not accurately reflect the value of the easement, other than to claim they are arbitrary.

Intervenor-petitioner's first assignment of error is denied.

INTERVENOR-PETITIONER'S SECOND ASSIGNMENT OF ERROR

In her second assignment of error, intervenor-petitioner alleges that "at the August 13, 2008

Eugene City council meeting, several city employees including the city's legal counsel provided knowingly false information to the City Councilors to motivate them to approve the requests by the time the meeting was adjourned." Intervenor-Petitioner's Amended Petition for Review 4. Intervenor-petitioner contends that staff's and the city attorney's actions resulted in a procedural error that prejudiced her substantial rights.

Questions arose among city councilors at the end of the August 13, 2008 city council meeting about the adequacy of the Basis of Value Report. Intervenor-petitioner argues that because the city manager was present at that meeting, the city could easily have required that the fair market value of the vacated right-of-way be valued higher than the estimate set out in the Basis of Value Report. Intervenor-petitioner contends that city staff and the city's attorney falsely advised the city council that it was not possible to deviate from the fair market value in the Basis of Value report.

During its August 13, 2008 deliberations, one member of the city council made a motion, which was seconded, to increase the estimate of special benefit by $984,221. Record 51. The moving city councilor reasoned that the 65 percent reduction in value to reflect the retained pedestrian and sidewalk easement on 12,196 square feet of the vacated right-of-way was arbitrary and that the estimate of special benefit should be increased to reflect lost parking spaces. *Id.* Discussion then ensued with staff and the city attorney about the possible consequences of passing that motion, whether an appraisal would be needed to justify such an increase in estimated

special benefit, whether the university would likely appeal such an action and whether it was likely the university would prevail in such an appeal. Record 51-54. The motion was subsequently withdrawn and replaced with a motion to direct the city manager to continue to negotiate with the university regarding the fair market value of the vacated right-of-way. Record 55. After there was additional discussion on the new motion, the city attorney reminded the city council that there was a 30-day deadline for their action on the requested vacations:

> "[The city attorney] reminded the Council that Section 9.7450 of the City Code required them to make a decision within thirty days of the close of the record which in this case would be September 10, 2008, unless a longer time frame was agreed to by the persons or entity initiating the application. He said if the Council wanted to consider new evidence such as a new appraisal they would need to re-open the record, which could not be done given the processes involved and the upcoming Council break." Record 55-56.

In a subsequent vote by the City Council, the second motion failed. Record 56.

Erroneous information, if relied on by the city council, might result in a decision that is not supported by substantial evidence, but we have some difficulty seeing how city council's receipt of erroneous information could result in a procedural error that would prejudice intervenor-petitioner's substantial rights. In any event, in our view, intervenor- petitioner has not identified any "false

information" that was relied on by the city council.

Intervenor-petitioner's second assignment of error is denied.

The city's decision is affirmed.